



Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Oregon Iron Works, Inc.

File: B-247845

Date: May 27, 1992

Elizabeth Yeats, Esq., Seifer, Yeats, Whitney & Mills, for the protester.
Vicki R. Roberts for Transco Industries, Inc., an interested party.
Lester Edelman, Esq., Department of the Army, for the agency.
Tania L. Calhoun and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that low bidder should not be allowed to withdraw a mistake in bid claim after a request for bid correction is denied is without merit where the record indicates a mistake was made and low bidder presents sufficient evidence of a reasonable estimation of omitted costs to indicate that the intended bid would have been low.

2. Protest that low bid should be rejected as nonresponsive because it is unbalanced is denied where protester fails to demonstrate that bid contained both understated prices for some items and overstated prices for others, and there is no doubt that award will result in the lowest overall cost to the government.

3. Protest that low bid should be rejected as nonresponsive because low bidder did not accurately follow solicitation instructions with regard to calculation of state use tax is denied where low bidder did not take exception to the use tax requirement, but rather miscalculated the tax and failed to include its full costs.

DECISION

Oregon Iron Works, Inc. (OIW) protests any award to Transco Industries, Inc., the apparent low bidder, under invitation for bids (IFB) No. DACW57-92-B-0016, issued by the

Department of the Army, Corps of Engineers, Portland District, for the fabrication and installation of fish screens¹ at the Dalles Powerhouse in Washington. OIW principally argues that Transco should not be allowed to withdraw a claimed mistake in its bid and receive the contract at its original bid price.

We deny the protest.

The Army issued the solicitation on January 27, 1992. The bid schedule contained nine contract line item numbers (CLIN) relevant to this protest: CLINs 0001 and 0002, fabrication of submerged traveling screens and installation of the screens, respectively; CLINs 0003 and 0004, fabrication of submerged bar screens and installation of the screens, respectively; CLINs 0005 through 0007, various parts and components; and CLINs 0008 and 0009, both for fabrication and installation of vertical barrier screens. The IFB warned bidders that they were responsible for the payment of Washington's use tax on the value of the equipment and materials installed in Washington. The IFB further cautioned that since all materials in the contract were to be installed in Washington, bidders should include the amount of the use tax in the installation portion of their bids; consequently, all of the CLINs except for 0001 and 0003, which required only fabrication, were to include the amount of the use tax.²

A review of the three bids received on February 28 indicated that Transco was the apparent low bidder, at a price of \$4,011,854. The second low bid was submitted by OIW, at a price of \$4,736,100.

After reviewing the bids, the Army asked Transco to verify its bid. On March 6, the agency received a letter dated March 5 in which Transco verified its bid; however, the contracting officer states that on March 5 Transco orally informed the agency of an unspecified error in its bid. OIW protested to our Office on March 6. On March 10, Transco informed the agency that its error was in using the wrong

¹Fish screens operate in the intake waterways of hydroelectric turbines to divert downstream migratory fish away from the turbines.

²CLIN 0002 was to contain the use tax attributable to CLIN 0001, and CLIN 0004 was to contain the use tax attributable to CLIN 0003.

type of tax;³ on March 11, Transco informed the agency that, contrary to its earlier statement, its error was in computing the use tax only on the cost of raw materials, rather than on the total value of the installed equipment and materials.⁴ On March 12, Transco asserted that the correct calculation of the use tax increased its bid by \$214,759, for a total bid of \$4,226,613. Transco asked the agency to allow the correction of its bid.

On March 16, the agency denied Transco's request to correct its bid.⁵ While the agency acknowledged that Transco had made apparent errors in its tax computation, it found that Transco had not met the applicable bid correction standards to allow correction. Accordingly, the agency informed Transco that it would favorably review a request to withdraw its bid. On March 20, Transco notified the agency that it would perform the contract at its original bid price of \$4,011,854 and would absorb the additional use tax it failed to include in its original bid. On May 13, the Army decided to proceed with the procurement based on urgency and awarded the contract to Transco at its original price while OIW's protest was pending.

OIW argues that Transco's explanation of the nature of its alleged mistake lacks credibility because Transco initially verified its bid and later claimed a mistake based on application of the incorrect tax, before finally asserting that it failed to apply the use tax to all covered cost elements. OIW also argues that because Transco did not submit its original worksheets to demonstrate the claimed error there was insufficient evidence to indicate the intended bid.

Generally, where there is evidence that a mistake was made and how it was made, but no clear and convincing evidence of the exact bid intended, the bid may not be corrected and the error may not be waived; the agency may only permit with-

³Transco stated it used Washington's business and occupation tax, at a rate of 1/2 percent, instead of the use tax, at a rate of 7 percent.

⁴Transco explains that this erroneous computation was based on information obtained from Washington state employees pursuant to a municipal contract it held.

⁵The Army reports that the Portland District, which denied Transco's request for bid correction, does not have the authority to do so; that authority resides in the Chief Counsel. The Chief Counsel states, however, that his initial review of the alleged mistake reveals that Transco made an error in judgment for which correction is not available.

drawal of the bid, Hercules Demolition Corp. of VA, B-223583, Sept. 12, 1986, 86-2 CPD ¶ 292; LABCO Constr., Inc., B-219437, Aug. 28, 1985, 85-2 CPD ¶ 240. However, acceptance of a low bid is permitted when it would not be prejudicial to the other bidders and if the evidence clearly shows that the intended bid would also be low, even though the intended bid could not be established with the certainty required by the rules applicable to correction of bids. Duron Paper Bag Mfg. Co., 65 Comp. Gen. 186 (1986), 86-1 CPD ¶ 6; Alaska Mechanical, Inc., B-235252, Aug. 14, 1989, 89-2 CPD ¶ 137. Whether the intended bid would have been lowest may be ascertained by reference to reasonable estimations of omitted costs. Bruce-Andersen Co., Inc., 61 Comp. Gen. 30 (1982), 81-2 CPD ¶ 310.

Although Transco did not submit worksheets in support of its claim, we think that examination of the amounts Transco bid for the individual CLINs reasonably shows that a mistake was made and that it was due to omission of the use tax, as Transco maintains. As noted above, the IFB provided that bidders should include the amount of the use tax in the installation portions of their bids; consequently, all of the CLINs except for 0001 and 0003, which required only fabrication, were to include the amount of the use tax. Thus, for example, Transco's bid for CLIN 0002 was to include the use tax of 7 percent applied against Transco's total bid for CLIN 0001 (\$1,249,320), with a resulting use tax amount of \$87,452.40; since Transco bid only \$43,520 for CLIN 0002, it is apparent from the face of the bid that Transco omitted all or a substantial part of the use tax.⁶

For the purpose of waiving the mistake in its low bid, Transco need only provide reasonable estimations of its omitted costs, in this case the proper amount of use tax, to show that its intended bid was also low. In its March 12 letter to our Office, Transco provided what it claims are the costs of the raw materials against which it originally calculated the use tax; Transco also provided a calculation of the proper amount of the use tax. Since the use tax apparently applies to the total bid price less installation costs and crane rental,⁷ its calculation is a matter of

⁶Likewise, with regard to CLIN 0004, which was to include the use tax attributable to CLIN 0003, the use tax of 7 percent was to be applied against Transco's total bid for CLIN 0003, \$1,134,750, with a resulting use tax amount of \$79,435.50. Transco, however, bid only \$43,520 for CLIN 0004.

⁷Transco attributes this explanation to the supervising revenue auditor for the Washington Department of Revenue; this explanation is not disputed by OIW.

applying the 7 percent use tax rate to the total bid for each CLIN except 0002 and 0004, as these items are the installation CLINs.⁶ In its calculations, Transco subtracted what it asserted to be the amount of use tax it did include in its original bid; however, even if those subtractions are not made, Transco's intended bid would still be the lowest bid (\$4,285,389, or \$450,711 below the next low bid).⁷

In light of the fact that the use tax is ascertainable by calculating the 7 percent rate against the bids for the relevant CLINs, we find that the record contains sufficient reasonable estimates of those omitted costs. Further, the intended bid under Transco's calculation is still significantly lower than the second low bid; consequently, the mistake properly may be waived.

OIW alternatively argues that Transco's bid should be rejected because it is presumptively unbalanced. OIW premises this argument on its belief that Transco's written verification of its bid created the presumption that the bid was without error and thus contained the proper amount of use tax. OIW argues that since the use tax was clearly not included in Transco's bids for the installation CLINs, it must be included in its bids for the fabrication CLINs; hence those CLINs are materially overstated.

Before a bid can be rejected as unbalanced, it must be found both mathematically and materially unbalanced. A bid is mathematically unbalanced where it is based on nominal prices for some of the items and enhanced prices for other items. OMSERV Corp., B-237691, Mar. 13, 1990, 90-1 CPD ¶ 271. A bid may not be found mathematically unbalanced absent evidence that it contains prices which are overstated. IMPISA Int'l, Inc., B-221903, June 2, 1986, 86-1 CPD ¶ 506. A mathematically unbalanced bid is considered materially unbalanced and cannot be accepted where there is a reasonable doubt that acceptance of the bid will result in the lowest overall cost to the government. Star Brite Constr. Co., Inc., B-244122, Aug. 20, 1991, 91-2 CPD ¶ 173.

While Transco's bid contains understated prices due to omission of the full costs of the use tax, there is no evidence that Transco's bid contains any corresponding overstated prices. OIW's argument that Transco's bid is presumptively

⁶We note that this is how OIW calculated the use tax in its protest to our Office.


⁷Even if the 7 percent rate is applied flatly to the total amount of Transco's original bid the result is \$4,292,684, which is still low by \$443,416.

unbalanced, is unsupportable; there must be evidence of overstated prices. See IMPESA Int'l, Inc., supra. Since OIW has failed to show, and there is no evidence in the record, that Transco's bid contained both overstated prices for some items and understated prices for others, we see no basis to consider Transco's bid to be mathematically unbalanced.¹⁰ OIW has also failed to show how award to Transco could result in other than the lowest overall price to the government.

OIW maintains that Transco's bid is below cost--i.e., that it does not reflect Transco's actual cost of performance. The submission of a below-cost bid is not improper, however; the government cannot withhold award merely because a responsive bid is below cost. International Serv. Corp., B-220006.2, Sept. 9, 1985, 85-2 CPD ¶ 282.

OIW contends that Transco's bid is nonresponsive because the firm failed to comply with the solicitation's use tax provision. A responsive bid is one that provides an unequivocal offer to tender the exact thing called for in the IFB such that acceptance of the bid will bind the contractor in accordance with the solicitation's material terms and conditions. Seaboard Elecs. Co., B-237352, Jan. 26, 1990, 90-1 CPD ¶ 115. Only where a bidder provides information with its bid that reduces, limits or modifies a solicitation requirement may the bid be rejected as nonresponsive. DOD Contracts, Inc., B-227689.2, Dec. 15, 1987, 87-2 CPD ¶ 591. Here, Transco did not take exception to the use tax requirement on the face of its bid; rather, it failed to properly calculate the use tax and thereby did not include the full costs of the tax in its bid. Notwithstanding this error, Transco unequivocally offered to perform as required in the IFB and the bid therefore is responsive.

The protest is denied.


for James F. Hinchman
General Counsel

¹⁰Since there is no evidence that Transco's bid is mathematically unbalanced, OIW's argument that Transco's unbalanced bid will result in an improper advance payment fails.